

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEREK DOTSON,

Defendant-Appellee.

UNPUBLISHED
October 19, 1999

No. 214838
Wayne Circuit Court
LC Nos. 98-004929
98-005953

Before: Gribbs, P.J., and O’Connell and R. B. Burns*, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court’s dismissal of two counts of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We reverse and remand.

In separate informations, defendant was charged with offenses allegedly occurring on April 13, and May 11, 1998. At the consolidated trial, the proofs showed that the offenses were committed on April 14, and May 12, 1998. After the prosecution rested, defense counsel moved for dismissal based on the variance between the dates contained in the informations and the testimony at trial. The trial court reviewed the testimony and granted the motion to dismiss, but refused to allow the prosecutor to amend the informations to conform to the proofs.

On appeal, the prosecutor argues that the trial court erred in dismissing the charges instead of allowing the amendment. We agree. This Court reviews a trial court’s refusal to allow the amendment of an information for abuse of discretion.¹ See MCL 767.76; MSA 28.1016; *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

A trial “court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence” provided that the defendant is granted a reasonable continuance, and sometimes a new trial, if necessary to avoid prejudice. MCL 767.76; MSA 28.1016. As long as the information notifies defendant of the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

nature and character of the charges, which is undisputed in this case, “[n]o variance as to time shall be fatal unless time is of the essence of the offense.” MCL

767.45(1)(a), (b); MSA 28.985(1)(a), (b). Here, time was not of the essence because it was not an element of the charged offenses; therefore, the informations were not fatally defective. See MCL 767.51; MSA 28.991; see also *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989). Similarly, the alibi statute does not require that the prosecution specify the time and date of the offenses charged. MCL 768.20; MSA 28.2043. The trial court therefore abused its discretion in refusing to permit the amendment.

Defendant counters that, even if the trial court erred, double jeopardy bars retrial on the same charges. We disagree. We review important constitutional issues even if not raised below. *People v Everard*, 225 Mich App 455, 465; 571 NW2d 536 (1997).

Where a “trial is concluded prematurely,” double jeopardy does not bar retrial if “the defendant consented to the interruption or a mistrial was declared because of a manifest necessity,” as distinguished from a resolution of the merits of the prosecution’s case. *People v Mehall*, 454 Mich 1, 4-5; 557 NW2d 110 (1997). Thus, retrial is permitted where, as here, “a defendant deliberately chooses to seek termination of proceedings against him on a legal technicality unrelated to his factual guilt or innocence.” *People v Knez*, 173 Mich App 402, 404; 433 NW2d 423 (1988). Here, the trial court clearly stated that it was dismissing due to the time variance, not because it found the charges unproven. We also note that, had the trial court discharged the jury and ordered a new trial to accommodate amendment of the information, defendant would “not be deemed to have been in jeopardy.” MCL 767.76; MSA 28.1016.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Peter D. O’Connell

/s/ Robert B. Burns

¹ In contrast, if the trial court had allowed the prosecution to amend the information, we would not reverse unless defendant was prejudiced in his defense or a failure of justice resulted. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982); *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980).